U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 09 September 2003

BALCA Case No.: 2002-INA-122
ETA Case No.: P1998-CA-09390535

In the Matter of:

LAPP, INC.,
Employer

on behalf of

MAURICIO VANEGAS,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Lisa M. Zakar, Immigration Consultant
Los Angeles, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from an application for labor certification[1] filed by a property management company for the position of Building Maintenance Repairer. (AF 29-30).[2] The following decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File ("AF").

[1] Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[2] "AF" is an abbreviation for "Appeal File."

STATEMENT OF THE CASE

On August 27, 1996, Employer, LAPP, Inc., filed an application for alien employment certification on behalf of the Alien, Mauricio Vanegas, to fill the position of Building Maintenance Repairer. Hours of employment were listed as 8:00 a.m. to 4:30 p.m. for a forty-hour week, with variable overtime. Minimum requirements for the position were listed as two years experience in the job offered. The job to be performed was described as follows:

> The maintenance repairer will be responsible for maintaining and repairing apartment buildings, including plumbing & electrical repairs, repairing and replacing woodwork, laying subfloors, painting & repairing plaster. Will use carpenter's tools and hand and power construction tools. Must be available for emergencies between 10pm and 6am. (AF 29-30).

An Assessment Notice was issued by the California Employment Development Department on September 23, 1997 advising Employer that its "subjective terms" of "[m]ust be available for emergencies between 10 pm and 6 am" must be deleted. Employer was instructed:

> The job offer requires that the worker must be available on call 24 hours per day. California Department of Industrial Relations, Division of Labor Standards Enforcement (DLSE) regulations require that workers employed with this stipulation must be compensated in accordance with DLSE regulations. The employer must amend the job offer and any additional recruitment to state "Must be available on call 24 hours per day: The employer will compensate in accordance with California state law and regulations."
> (AF 158-159).

Employer advertised for the position without the amendment (AF 146-149) and received a total of 35 applicant referrals in response to its recruitment efforts, all of whom were rejected as either unqualified, disinterested and/or unavailable for the position. (AF144, 88, 36-37).

A Notice of Findings (NOF) was issued by the CO on March 5, 2001, proposing to deny labor certification based upon a finding that Employer had rejected numerous apparently qualified U.S. workers for other than lawful, job-related reasons. Specifically, as pertinent herein, the CO questioned the rejection of several applicants who Employer said were rejected because they refused to be on 24-hour call. The CO observed, "[w]e note your ad did not include the offer you made 27 September 1977 to compensate on-call hours at the California legal rate. It appears to us that you failed to make that offer to these qualified U.S. workers as well." Employer was instructed to explain, with specificity, the lawful job-related reasons for not hiring each U.S worker referred. (AF 25-28).

In Rebuttal, Employer stated that each of these applicants was advised at the time of interview that they would be compensated in accordance with California State Law and regulations for being available on an overtime basis, but that they indicated they would not be available for any overtime. (AF 24).

A Supplemental NOF was issued by the CO on June 6, 2001, citing regulations 20 C.F.R. §§ 656.21(b)(1) and 656.21(g), requiring that all elements of the position be contained in the advertisement. Corrective action was prescribed as requiring Employer to submit a statement of willingness to retest the labor market and a copy of its draft advertisement. (AF 21-23).

In Rebuttal, Employer stated a willingness to re-advertise and submitted a proposed advertisement. (AF 20).

A second Supplemental NOF was issued by the CO on September 6, 2001, advising Employer that its proposed ad was unsatisfactory. Employer was further instructed on what the ad should say in order to satisfy the finding. (AF 17-19).

By letter dated October 23, 2001, Employer indicated that it had mailed its reply to the September 6, 2001 NOF well before the October 11, 2001 due date and that the envelope was returned to its representative's office that day reading 'No Such Box Number', "even though the Box Number is listed correctly." Employer continued:

> We are hereby enclosing the original envelope and response with the Certificate of Mailing verifying mailing on 9/9/01 (sic). The envelope shows two postmarks, one in September when the envelope was first mailed; and another in October when the envelope was just returned to us.

A copy of the envelope with the two postmarks, a certified mail receipt evidencing mailing on September 28th and a letter with the new proposed ad dated September 21st was enclosed. (AF 6-11).

On October 31, and again on November 1, 2001, the CO issued a letter stating that because Employer had failed to rebut the NOF dated September 6 within the allotted 35 days, the NOF automatically became the FINAL decision of the Secretary of Labor DENYING labor certification. (AF 2,3,5).

By letter dated November 9, 2001 Employer again advised that a response was timely mailed but returned incorrectly, marked "NO SUCH BOX NUMBER." (AF 4). The CO, however, advised Employer that its Request for Reconsideration was denied. (AF 1). The matter was docketed in this office on March 15, 2002.

DISCUSSION

Pursuant to section 656.25(c), if a CO does not grant certification, a NOF must be issued which states the date on which the NOF was issued, the specific grounds for issuing the NOF, and the date by which a rebuttal must be made. As was stated in the NOF: "Failure to file a rebuttal in a timely manner shall constitute a failure to exhaust available administrative appellate remedies"; and "All findings in the Notice of Findings not rebutted shall be deemed admitted." 20 C.F.R. § 656.25 (e)(2) and (3).

In the instant case, the final supplemental NOF was issued by the CO on September 6, 2001 and Employer was advised that "[i]f the rebuttal is not mailed by certified mail on or before October 11, 2002 this Notice of Findings automatically becomes the final decision of the Secretary denying labor certification." (AF 17). On October 31, and again on November 1, 2001, the CO issued a letter stating that because Employer had failed to timely rebut the NOF, it automatically became the FINAL decision of the Secretary of Labor DENYING labor certification. (AF 2,3,5).

However, the record reflects that on October 23, 2001 Employer submitted a letter stating that it had mailed its reply to the September 6, 2001 NOF on September 28, well before the October 11, 2001 due date, and that the envelope was returned to its representative's office on October 23rd with a notation of "No Such Box Number." Employer enclosed copies of the original envelope and response with the Certificate of Mailing verifying mailing on 9/28/01. The envelope shows two postmarks, one in September when the envelope was first mailed; and another in October when the envelope was returned to Employer. Thereafter, in response to the CO's November 1, 2001 denial on the basis of an untimely filing, Employer reiterated its position and again sent verification of its timely mailing.

Citing *Harry Tancredi*, 1988-INA-441 (Dec. 1, 1988)(*en banc*), and stating that the letter sent was addressed to Sacramento rather than San Francisco, the CO summarily

denied Employer's Request for Reconsideration. Where evidence submitted with a timely motion for reconsideration was not available during the rebuttal period, it may be an abuse of discretion for the CO not to reconsider. For example, where the Final Determination is based on untimely rebuttal the employer obviously has had no prior opportunity to submit evidence to support a contention that it filed a timely rebuttal. *Tancredi, supra*. When Employer submits evidence of mailing in a motion for reconsideration following a denial based on failure to file rebuttal, fairness dictates that the CO examine the evidence presented and, if sufficient, reconsider the decision. *Andrea Foods,* 1994-INA-309 (Sept. 21, 1994).

The Board has previously held that rebuttal was untimely when mistakenly sent to the state job service rather than to the CO. *Torres Discount Radiator,* 1988-INA-324 (Feb. 7, 1990); *Korean Broadcasting Co,* 1993-INA-72 (May 4, 1994); *Equitable Ins. Col,* 1991-INA-32 (Mar. 20, 1992). Here, however, the record reflects that Employer properly and timely sent its rebuttal to the correct reviewing agency, the CO, but inadvertently addressed it to Sacramento, California rather than San Francisco, California. Moreover, the record reflects the Employer attempted to rectify the mistake promptly by immediately resending the rebuttal with documentation of its timely attempt. The Board has never favored denial of certification on purely technical grounds. *H.B.M. Constru./Dev*., 1988-INA-539 (Jan 31, 1990); *Kleinfeld Bridal Shop,* 1994-INA-31 (June 28, 1995)(*en banc*).

In response to each of the three NOFs issued, Employer has stated a willingness to re-advertise and retest the labor market. In light of Employer's timely responses to the issuance of the prior March 5, 2001 and June 6, 2001 NOFs, coupled with the documented effort to timely respond to the September 6, 2001 NOF, we conclude in the instant case that reconsideration on the merits is appropriate. *See Cynthia Kincaid*, 1988-INA-320 (June 14, 1989).

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and the matter is **REMANDED** for findings consistent with this decision and order.

For the panel:

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JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.